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Supreme Court of the United States

OCTOBER TERM 1947

No. 491

ROBERT BRADLEY
Petitioner,

vs.

STATE OF CONNECTICUT
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Counsel for Respondent.

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I

ARGUMENT

SUMMARY OF THE ARGUMENT

Point A. A Federal question was not decided or involved in the decision of the State Court.

Point B. The decision of the State Court is correct.

POINT A

A Federal question was not decided or involved in the decision of the State Court.

1. As to the denial of Petitioner's motion for separate trials on the three counts, this was a matter within the discretion of the trial court. The Supreme Court of Errors after reviewing all

of the testimony decided that the counts were properly tried together and accordingly refused to overrule the discretionary judgment of the court below (R. 748). We submit that therein no Federal question was involved and that this ruling is not subject to review by this Court.

Nevada, California & Oregon Railway vs. *Burrus*, 244 U. S. 103; 37 Sup. Ct. 576.

Smith vs. *Mississippi*, 162 U. S. 592; 16 Sup. Ct. 900.

Carr vs. *Nichols*, 157 U. S. 370; 15 Sup. Ct. 640.

2. As to whether the supplemental instructions given to the jury deprived the Petitioner of a fair trial in violation of the Sixth Amendment of the United States Constitution, the short answer is that the Sixth Amendment does not limit the power of the States but operates in restraint of the Federal Government only. And in any event this right was not specially set up or claimed in the State Court as required by the provisions of Judicial Code 237B. The only objection voiced by Petitioner related to the timeliness of the charge and not as to its constitutionality (R. 42, F. 209). Petitioner took no exception to the Court's subsequent repetition of these instructions (R. 51, 54). The first reference to a Federal claim in this respect is contained in Petitioner's Brief to the Supreme Court of Errors (Petitioner's Brief below, pg. 14). At this point the claim came too late and here too, the opinion of the state court contains nothing to show that any Federal question was considered or determined.

El Paso & Southwestern Railway Co. vs. *Eichel and Weikel*, 226 U. S. 590; 33 Sup. Ct. 179.

Chicago I. & L. Railway Co. vs. *McGuire*, 196 U. S. 128; 25 Sup. Ct. 200.

POINT B

The decision of the State Court is correct.

1. As to the refusal to grant separate trials on each count. The joinder of counts for different offenses against the same person is specifically authorized by Section 6451 of the General Statutes of the State of Connecticut which provides as follows: "Whenever two or more cases shall be pending at the same time against the same party, in the same court, for offenses of the same character, counts for such offenses may be joined in one information unless the court shall order otherwise."

In *State* vs. *Kemp*, 126 Conn. 60, 84; 9 Atl. (2d) 63, the Supreme Court of Errors held that in view of the statute such a joinder in one indictment or information cannot be regarded as so prejudicial in itself as to make a trial thereon improper. Although the statute refers specifically to informations, the same principle applies as regards counts in an indictment for murder.

The matter lies within the discretion of the trial court and the exercise of that discretion cannot be interfered with unless it has been manifestly abused.

See Opinion below, pg. 748.

See also *Lemmon* vs. *U. S.*, 164 Fed. 953, 958; 90 C. C. A. 617.

1 Wharton Crim. Proc. (10th Ed.) 335.

23 Corpus Juris Secundum 209, 210.

The conclusions of the Supreme Court of Errors are not at variance with, but are supported by, controlling authority in this Court.

Pointer vs. *U. S.*, 151 U. S. 396; 14 Sup. Ct. 410.

The case of *McElroy* vs. *U. S.*, 164 U. S. 76, 80; 17 Sup. Ct. 31, 41 L. Ed. 355, upon which the defendant relies gives little support for his contention. That case relates to a Federal statute which provides for consolidation of counts where the offenses are of the same class or are connected, but the crimes therein charged were in fact not of the same class or connected. On the other hand in the instant case the defendant in the commission of these three murders was actually engaged in carrying out a common design. Accordingly they were properly tried together.

Moreover, we submit that no prejudice accrued to the defendant from this joinder, because even if he had been tried on only one of these murder counts, evidence as to the other murders would have been admissible under the rule that where other crimes are so connected with the principal crime by circumstance, motive or design or innate peculiarity that the commission of the collateral crime tends to prove the commission of the principal crime or the existence of any essential element of the principal crime, the evidence is admissible.

State vs. *Chapman,* 103 Conn. 453.

State vs. *Schleifer,* 102 Conn. 709.

And as recently stated by the Connecticut Supreme Court, such evidence is permitted to show identity, intent and "a common scheme embracing the commission of two or more crimes so related to each other that proof of one tends to establish the other."

State vs. *Barnes,* 132 Conn. 370, 372.

See also *People* vs. *Duffy,* 212 N. Y. 57; 105 N. E. 839, 841

State vs. *Monroe,* 142 Minn. 394; 172 N. W. 313.

People vs. *Moriana,* 196 Cal. 154; 236 P. 135.

2. As to depriving petitioner of his right to trial by impartial jury. Defendant contends that the reading and later reference

to the designated portion of the opinion in *State* vs. *Smith,* 49 Conn. 376, 386, constituted an invasion by the court of the province of the jury. Necessarily the authorities cited come from without the state, for the use of the instruction approved in that case in the year 1881 has been consistently upheld by the Connecticut Supreme Court since that time.

State vs. *Mosca,* 90 Conn. 381, 385; 97 A. 340.

State vs. *Schleifer,* 102 Conn. 708, 725; 130 A. 184.

State vs. *Wyman,* 118 Conn. 501, 507; 173 A. 155.

State vs. *Monte,* 131 Conn. 134, 136; 38 A. 2nd 434.

In none of the statements complained of was there any coercion nor was there any indication by the court as to what course the jury should take in reaching its verdict. As stated by the Connecticut Supreme Court (R. pg. 750) "The record makes it evident that the final agreement of the jury was not reached because of submission to any improper urging by the court, but upon the basis of the answer given by it to the inquiry. We cannot on this record find that the instructions of the trial court based upon *State* vs. *Smith, supra,* constituted reversible error because they coerced the jury or any member of it or unduly urged upon them the desirability of an agreement."

It is therefore respectfully submitted that this case is not a proper one for review by certiorari in this Court, and that the petition for a writ of certiorari should be denied.

Dated January 12, 1948.

ABRAHAM S. ULLMAN,
ARTHUR T. GORMAN,
Counsel for Respondent.